* **HIGH COURT OF DELHI : NEW DELHI**

CM (M) No. 1064/2010 & CM No. 14828/2010 (stay)

% Judgment reserved on: 18th August, 2010

Judgment delivered on: 25th August, 2010

Sh. Harinder Singh,
S/o Shri Kuldeep Singh
R/o C-20, Fateh Nagar,
Tilak Nagar,
New Delhi

….Petitioner.

Through: Mr. Anand Prakash & Ms. Babita Seth, Advocates.

Versus

1. Sh. Kuldeep Singh
   S/o Late Sh. Karam Singh
   R/o House No. 9, Road No. 13,
   Punjabi Bagh Extn.
   New Delhi- 110026

2. Vijaya Bank
   (through its Manager)
   Branch Office Kamla Nagar,
   Delhi.

….Respondents

Through: None

Coram:
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

V.B.Gupta, J.

By way of present petition filed under Article 227 of the Constitution of India, petitioner has challenged order dated 12th May, 2010 passed by Additional District Judge Delhi, vide which application of petitioner filed under Order 9 Rule 7 read with section 151 of Code of Civil Procedure (for short as 'Code') was dismissed with costs of Rs.4,000/-.

2. Respondent herein, filed a suit for recovery of Rs.3,11,818/- along with interest against the petitioner and respondent no.2. As per list of dates, counsel for petitioner who had been appearing and contesting the case on behalf of petitioner, did not appear in the matter on 21st August, 2007 and as such case was adjourned to 27th September, 2007, on which date again petitioner counsel did not appear. On the adjourned date, i.e. 30th October, 2007, court was on leave and matter was adjourned to 3rd November, 2007. On 3rd November 2007, the matter was adjourned for 7th January, 2008 and again counsel for petitioner, did not appear on that day and as such, petitioner was proceeded ex parte.

3. It is contended by learned counsel that petitioner came to know about ex parte order dated 7th January, 2008, only on 30th January, 2010, when new counsel engaged by petitioner, inspected the case file. Earlier counsel had assured the petitioner that he will appear and take care of the

case and call the petitioner as and when required. Thus, petitioner was under bonafide impression and belief that counsel would inform him, as and when required.

4. Other contention is that, the trial court did not adjudicate the application filed under Section 5 of the Limitation Act and petitioner cannot be penalized for non-appearance of his counsel.

5. Present petition has been filed under Article 227 of the Constitution of India. It is well settled that jurisdiction of this Court under this Article is limited.

6. In ***Waryam Singh and another vs. Amarnath and another, AIR 1954, SC 215,*** the court observed;

> "This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in – 'Dalmia Jain Airways Ltd. V. Sukumar Mukherjee', AIR 1951 Cal 193 (SB) (B), to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors."

7. In light of principles laid down in the above decision, it is to be seen as to whether present petition under Article 227 of the Constitution of India against impugned order is maintainable or not.

8. Order 9 Rule 7 of the Code read as under;

> **"7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance**-
> Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."

9. As per above provision, petitioner has to show "good cause for his previous non-appearance." Recovery suit against petitioner was filed in the year 2007. As per petitioner's own case, neither he nor his counsel appeared in the Court on 21st August, 2007 and continuously thereafter, on three dates. This, itself show that trial court has shown great indulgence in favour of the petitioner, otherwise petitioner could have been proceeded ex parte even on 21st August, 2007. Trial court after adjourning the matter thrice, proceeded ex parte against petitioner only on 7th January, 2008. Application for setting aside ex parte order, was filed in the year 2010.

10. In entire application, it is nowhere stated as to on which date petitioner came to know about the passing of ex parte order dated 7th January, 2008. Only ground taken in the application is that, petitioner engaged a new counsel who inspected the case file on 30th January, 2010 and then only petitioner came to know that he has been proceeded ex parte on 7th January, 2008. Nowhere in the application it is stated as to what was

the occasion for petitioner to engage a new counsel and on which date new counsel was engaged. Application is absolutely silent on these aspects.

11. Order sheet dated 7th January, 2008 shows that, even on last two dates prior to 7th January, 2008, petitioner did not appear in court. Petitioner has also filed an application under Section 151 of the Code for production of certain documents. Filing of this application goes to show that petitioner was well aware of the date of hearing as 7th January, 2008.

12. Present petitioner is a chronic litigant as in the list of dates it is stated that, there are several cases filed by respondent no. 1 against petitioner. This goes on to show that petitioner is well aware of the court procedure and now he cannot take shelter under the garb that his counsel advised him not to appear in the matter. Assuming for arguments sake, that counsel for petitioner advised him not to appear in the court, then what was the occasion for petitioner all of a sudden to engage a new counsel to inspect the file on 30th January, 2010. It is also nowhere stated as to why petitioner engaged a new counsel.

13. Trial court in impugned order observed;

> "As matter of record on 7.1.08 the defendant was proceeded ex parte for non appearance. Even on the earlier occasion also the defendant has not appeared in the court. Further proceedings reveal that defendant no. 1 or his counsel did not appear in the court till filing of the present application by defendant

> no. 1 on 8.2.2010. Apparently, there is delay of around two years in filing of the present application. Defendant no. 1 might have engaged some other counsel but as found earlier the defendant no. 1 has not appeared in the court for long two years. The explanation of the defendant that his counsel has adviced him not to appear in the court does not inspire the confidence of the court because the period of two years is a big gap and further it is for the parties to be vigilant and proceed with their matters so that their interest is not defeated at any stage. The plea of defendant no. 1 that his counsel has stopped appearing in the court is found to be bald, bare and without any basis. In case such application are entertained and dealt with, it would amount to abuse to the process of law. Accordingly, the application stands dismissed with cost of Rs.4,000/- upon the defendant no.1."

14. It is well settled that failure of lawyer to appear is necessarily not a sufficient cause, conduct of parties has also to be seen. In ***'New Bank of India Vs. M/s. Marvels (India) and Others'*** ***2001 VI AD (Delhi) 536*** this Court observed:

> "There is no absolute proposition of law that all cases of mistakes on the part of the advocate or pleader would constitute sufficient cause. What is to be seen is as to whether absence of the advocate was bonafide. This is to be examined in conjunction with the conduct of the party who had engaged advocate viz. whether he was persuing his case diligently or the conduct and approach was so callous that it amounted to negligence. If this is so then non-appearance would not be bonafide and it would not constitute sufficient cause within the meaning of Order IX Rule 13 of the Code of Civil Procedure."

15. It was further observed:

> "No doubt the words "sufficient cause" should receive liberal construction so as to advance substantial justice. However when it is found that the applicants were most negligent in defending the case and their non-action and want of bonafide are clearly imputable, the Court would not help such a party. After all "sufficient cause" is an elastic expression for which no hard and fast guide-lines can be given and Court has to decide on the facts of each case as to whether the defendant who has suffered ex-parte decree has been able to satisfactorily show sufficient cause for non-appearance and in examining this aspect cumulative effect of all the relevant factors is to be seen."

16. Petitioner has taken the court proceedings in a very casual, careless and negligent manner. Since, as per petitioner's own admission several cases are pending between him and respondent no.1, he is not justified in shifting the entire blame on his counsel.

17. In ***Indian Sewing Machines Co. Pvt. Ltd. Vs. Sansar Machine Ltd. and Anr., 56 (1994) Delhi Law Times 45,*** it was observed;

> "The question to be examined is whether the responsibility of the defendants as a litigant comes to an end merely by engaging a counsel and should not a litigant show diligence on his part."

18. In ***Ravinder Kaur Vs. Ashok Kumar and Anr., (2003) 8 Supreme Court Cases 289,*** it has been laid down that;

> "Courts of law should be careful enough to see through such diabolical plans of the judgment debtors to deny the decree holders the fruits of the decree obtained by them. These type of errors on the part of the judicial forums only encourage frivolous and cantankerous

> litigations causing law's delay and bringing bad name to the judicial system".

19. In ***Salil Dutta v. T. M. and M. C. Private Ltd., (1993) 2 SCC 185,*** the Court observed;

> "The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. It is true that in certain situations, the court may, in the interest of justice, set aside a dismissal order or an ex parte decree notwithstanding the negligence and/or misdemeanor of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognized. Such an absolute rule would make the working of the system extremely difficult."

20. In view of above facts, no ambiguity or illegality can be found in the impugned order. Present petition under Article 227 of the Constitution of India is most bogus and friviolous one and same has been filed just to delay the proceedings in a recovery suit, which was filed long back about six years ago. Only motive of the petitioner is to delay the proceedings. Petitioner even did not pay the costs of Rs. 4,000/- imposed upon him by the trial court.

21. It is well settled that frivolous litigation clogs the wheels of justice making it difficult for courts to provide easy and speedy justice to genuine litigants. Those litigants who are in the habit of challenging each and every

order, even if the same is based on sound reasoning and goes on filling frivolous application/petition, must be dealt with heavy hands.

22. Under these circumstances, present petition which is meritless, bogus and most frivolous one, is hereby dismissed with costs of Rs.25,000/- (Rupees Twenty Five Thousand Only).

23. Petitioner is directed to deposit the costs by way of cross cheque with Registrar General of this court, within four weeks from today

24. List for compliance on 27th September, 2010.

CM No. 14828/2010 (stay)

25. Dismissed.

25th August, 2010 **V.B.GUPTA, J.**
ab